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6 DOMESTIC VIOLENCE TASK FORCE VIRTUAL MEETING

7 January 31, 2022

8 Held via Webex

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10 PRESENT:

11 Hon. Anna Barbara Hantz Marconi,

12 Associate Justice, New Hampshire Supreme Court

13 Hon. Susan Carbon, Circuit Court Judge

14 Hon. John Yazinski, Circuit Court Judge

15 Merrill Beauchamp, Director, Victim &

16 Witness Program

17 Kathy Beebe, Executive Director, Haven NH

18 Kristyn Bernier, Investigator, Belknap

19 County Attorney's Office

20 Steven Endres, Assistant County Attorney,

21 Merrimack County

22 Martha Ann Hornick, Grafton County

23 Attorney

24 Mary Krueger, Attorney, NHLA

25 Lynda Ruel, Director, Office of



1 Victim/Witness Assistance, NH DOJ

2 Amanda Grady Sexton, Director of Public

3 Affairs, New Hampshire Coalition

4 Jon Strasburger, New Hampshire

5 Association of Criminal Defense Attorneys

6 David Vicinanzo, Attorney, DOVE Program

7 Patricia LaFrance, Partner, The Black Law

8 Group

9 Pam Dodge, NHBA DOVE Program & 603 Legal

10 Sarah Freeman, NHJB, Circuit Court

11 Administrator

12 Jean Kilham, NHJB Domestic Violence

13 Program Manager

14 Erin Jasina, Director, NHLA DV Program

15 Anne Zinkin, NHSC Supervisory Law Clerk

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1 JUDGE HANTZ MARCONI: It is the  
2 January 31st -- eighth -- meeting of the  
3 task force on review of domestic violence  
4 cases in the judicial system. This is  
5 the grab bag meeting for, quote, all  
6 other relevant areas. And we have  
7 identified several, which is on the  
8 agenda that was sent around.

9 So we have, in no particular order,  
10 offenders using the judicial system to  
11 further harass, coerce, control victims,  
12 and RSA 173-B:I-(a)(3); (audio  
13 interference) for law enforcement on best  
14 practices for handling weapons seizures;  
15 co-occurrence of child abuse and domestic  
16 violence cases; whether there should be  
17 an exception under the wiretapping  
18 statute for domestic violence survivors  
19 so that that they may obtain evidence of  
20 the abuse without committing a crime and  
21 so that the evidence is admissible;  
22 judicial accountability, which may rise  
23 to the top.

24 And I've added but not on the agenda  
25 crisis center feedback. We've been



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1 monitoring the comments as they've come  
2 in, and there is some anecdotal  
3 information about individuals either  
4 being unable to be helped or not being  
5 helped, and also some anecdotal  
6 information from within the branch that  
7 some advocates are not as helpful as they  
8 might be. So this kind of goes with one  
9 of the topics we discussed before, which  
10 is how do you provide feedback outside of  
11 this task force, if you will.

12 So in no particular order, I'd like  
13 to have people talk about what's top of  
14 mind.

15 MS. LAFRANCE: So I -- I guess I'll  
16 start just on the topic of the amendment  
17 to the wiretap statute. This is -- I  
18 mean, in -- this comes up so often in my  
19 cases. And I -- I have often said that  
20 it should be amended to some kind of  
21 safety exception, I guess akin to, I  
22 don't know, the rationale behind, like,  
23 hot pursuit or exigent circumstances. So  
24 you know, I've always said that.

25 I run into it a lot in my practice.



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1 I'm very familiar with the wiretap  
2 statute. I used to authorize them for  
3 undercover police officers, so I know the  
4 ins and outs of it. I think there's  
5 multiple interpretations of when somebody  
6 can record. I don't know if any of the  
7 other attorneys feel the same way.

8 Because I always tell my client,  
9 obviously, you know, if you're out in  
10 public -- if, you know, that's fine.  
11 If -- the issue comes with -- when  
12 somebody has a phone and it's out and  
13 it's clear they're recording. And they  
14 say, I'm recording, right. And to me,  
15 you know, if -- if that other person  
16 continues talking -- and this might be a  
17 wrong interpretation of it -- but you  
18 know -- if -- if that person knows  
19 they're being recorded, then they have  
20 ultimately consented to being recorded,  
21 even though, you know, they may say I  
22 don't -- I don't give you permission to  
23 record me. Well, if you're phone's out  
24 and it's clear you're recording, then --  
25 I don't know.



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1 I don't know if anybody else has a  
2 different interpretation, but I think the  
3 statute --

4 JUDGE HANTZ MARCONI: Who would  
5 be --

6 MS. LAFRANCE: -- it's open for  
7 interpretation.

8 JUDGE HANTZ MARCONI: Who would be  
9 the so-called involved persons, parties,  
10 to, sort of, take this concept to the  
11 legislature? And anyone else can weight  
12 in, too.

13 MS. LAFRANCE: Yeah --

14 MS. SEXTON: I'll just say that the  
15 Coalition has had this on our, sort of,  
16 wish list for many years and have worked  
17 with parties. And there are interested  
18 legislators in bringing this forward.  
19 It's just a matter of doing that when the  
20 timing is right and when it's, sort of,  
21 the correct time to do that.

22 INV. BERNIER: I think also it needs  
23 to be fleshed out really specifically.  
24 I've done -- I've had, you know,  
25 authorization for undercover drug work.



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1 I've also gotten plenty of -- which  
2 goes -- is different than when we go for  
3 that -- the pretext call on a sexual  
4 assault or a domestic violence case when  
5 we want to do the phone call through the  
6 AG's office. Different set of standards  
7 in terms of what we can and can't do.

8 And really defining what is a safety  
9 exception because these recordings can  
10 simply be to -- can be used to rile  
11 someone up. They can be, you know,  
12 recorded, and then they never come  
13 forward; that's not an exigence.  
14 Holding, you know -- to play devil's  
15 advocate because I've seen these cases  
16 too many times. It's a safety exception  
17 and they're in fear for their safety and  
18 they record, I'm all for it.

19 But the -- the other thing is -- is  
20 how do you define something that can be  
21 legislated that doesn't end up being  
22 someone just recording things and  
23 sticking them in a file somewhere --  
24 where -- for when they decide they want  
25 to pull it all forward.



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1           And I think that's what makes this  
2           issue so difficult, is setting what those  
3           parameters are. And I think the  
4           parameters are going to be the key to  
5           getting the legislation passed. Because  
6           if there are too many open doors and too  
7           many ways that someone can, you know,  
8           exploit it for -- for not the purpose  
9           it's supposed to be used for, you're  
10          going to be less likely to get it passed.

11          So it -- it -- the -- it's not so  
12          much of who's going to take it, it's  
13          who -- who's going to craft it and make  
14          sure that it's rock-solid so that it --  
15          and it's been vetted out -- so that it  
16          does pass for the purpose for which it's  
17          being passed.

18          JUDGE HANTZ MARCONI: The law  
19          enforcement that works with this statute  
20          should be involved, is what I'm hearing.

21          INV. BERNIER: Well, you know,  
22          that -- which is -- it, you know, if --  
23          if something's exigent -- I mean, for the  
24          purposes of crafting it, absolutely.

25          Is it going to be something that





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1 somebody can, you know, take it to the PD  
2 because they're worried about something?  
3 Or there's a -- there's a DV order in the  
4 process or whatever. Or -- I mean, I  
5 think we -- there's a lot of different  
6 scenarios where this could come into play  
7 and be useful for the right reasons  
8 and -- but I think it's going to take a  
9 team of people to -- to hammer this out.

10 MS. JASINA: So NHLA has also within  
11 the last year been approached by another  
12 stakeholder who is interested in making  
13 some amendments to the wiretapping  
14 statute, which would allow for an  
15 exception from prosecution if somebody  
16 were recording while abuse is occurring  
17 and that -- and then that would be  
18 admissible evidence.

19 So we would certainly be interested  
20 in partnering with them and any other  
21 interested stakeholders that would like  
22 to see something like this pass, which  
23 would hopefully address some of the  
24 concerns that were just raised.

25 So I'm happy to reach out to that



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1 stakeholder as a -- actually, I've  
2 already done it. I talked to Jean about  
3 that, and they're interested in convening  
4 a group. And I think between NHLA and  
5 that group -- I think, you know, we could  
6 get something organized maybe over the  
7 summer to, kind of, flesh this out a  
8 little bit more.

9 MS. RUEL: And I took -- I took a  
10 poll of the systems-based advocates --  
11 and you know, Merrill jump in if you --  
12 if I forget something. They, too, think  
13 it would be a great idea. They do have  
14 some concerns around victim safety and  
15 victims feeling like it's their  
16 responsibility to gather their evidence  
17 in their case. So I just -- as we move  
18 forward just thinking about some of those  
19 things would be helpful for the -- the  
20 process of getting a resolution.

21 As Kristyn pointed out, you know,  
22 it -- it would need to be crafted for  
23 the -- for the intent it is intended  
24 for -- if I'm saying that right -- and  
25 not be used as another tool.



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1 INV. BERNIER: Here's the other  
2 thought, I'm a big fan of reverse  
3 engineering things. And I don't know if  
4 this is what, you know, those who have  
5 been tossing it around -- Amanda and  
6 others -- who have been toying with.

7 But I just had a case recently,  
8 marital rape case, and she recorded  
9 interactions in between -- in the middle  
10 of this, like there was a six-month old  
11 baby in the room, there was a one-and-a-  
12 half-year old -- the -- the tape is  
13 chilling. It wasn't covered, obviously,  
14 under the law. It became an issue  
15 because she had recorded it -- I don't  
16 think she realized she couldn't -- the  
17 defense tried to stick some Richards  
18 issues on with her.

19 But what's to say that we couldn't  
20 start by doing something that -- you  
21 know, if somebody goes to -- something's  
22 happening, and they -- their reaction is  
23 record it, allowing that to come into  
24 evidence if the -- so for instance,  
25 someday makes a report of DV or that rape



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1 case and -- I can't think of how many  
2 times somebody has come in and said,  
3 well, I have recordings, or I have  
4 this -- because they don't realize. But  
5 being able because they reported, because  
6 you have corroboration, there's a report  
7 going on, there's a case investigation.  
8 The allowance of those recordings to be  
9 utilized in conjunction with -- with the  
10 nature of the case. I don't know if you  
11 understand what I'm getting at.

12 It's almost like it -- it's not  
13 supposed to happen, but if there -- if  
14 they show that exigence, if they show  
15 that -- their evidence of those crimes --  
16 could something be crafted to allow them  
17 on a case-by-case basis.

18 JUDGE HANTZ MARCONI: As opposed  
19 to --

20 MS. LAFRANCE: And also --

21 MR. VICINANZO: I wonder --

22 JUDGE HANTZ MARCONI: --  
23 (indiscernible) statute.

24 MS. LAFRANCE: I'm sorry; go ahead.

25 JUDGE HANTZ MARCONI: Oh, I was



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1 going to say as opposed to an amendment  
2 to the statute, but a case-by-case  
3 evidentiary-type -- well, you'd still  
4 need a statute, but on a case-by-case  
5 basis, rather than (indiscernible) --

6 INV. BERNIER: Right. Which  
7 might --

8 JUDGE HANTZ MARCONI: -- broad  
9 exemption.

10 INV. BERNIER: -- which might give  
11 us something so that that, kind of, shuts  
12 down people just taping things willy-  
13 nilly. But it gives -- it gives us  
14 something to start with, and then  
15 something more encompassing could be  
16 assessed and crafted from there.

17 MS. LAFRANCE: So it -- yeah, it  
18 would be almost --

19 MR. VICINANZO: Yeah --

20 MS. LAFRANCE: -- the language would  
21 be if it were, you know, in the process  
22 or near the time of the commission of a  
23 crime. Something like that, Kristyn? Is  
24 that what you're saying?

25 INV. BERNIER: Yeah, essentially --



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1 like, and I'm thinking of this case --  
2 this example. Where her only thought  
3 process -- she didn't know what to do and  
4 I think, you know, the first thing,  
5 especially in the days of technology,  
6 she -- there was, you know, there was a  
7 little bit of time gap in between this.  
8 He wasn't letting her out, but she was  
9 able to hit record, and there's no  
10 question that these things were going on.

11 Had we been able to -- had we had  
12 something that could have allowed us to  
13 assess that and utilize that, it would  
14 absolutely have been helpful for the  
15 case. And she was doing it for the right  
16 reasons. She didn't know what to do,  
17 there was a huge safety issue. But as it  
18 stands now, you know, we're not.

19 So it would have to be commensurate,  
20 I guess, with, you know, obviously -- it  
21 would have to have -- be while it's going  
22 on, at least to start.

23 MR. VICINANZO: Well, can --

24 MS. SEXTON: I would recommend that  
25 we continue to have conversations about



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1 this. The process for bringing forward  
2 legislation includes, you know, bringing  
3 all stakeholders together and having  
4 really lengthy discussions over a period  
5 of time.

6 But I think it's appropriate for  
7 this task force to make a recommendation  
8 that there should be future discussions  
9 and explorations about this issue in  
10 addition to other statutory changes.

11 MR. VICINANZO: Well, to that end --  
12 I -- I'm -- this is Dave Vicinanzo, and I  
13 apologize, I don't have video access  
14 today.

15 But I don't know this for sure, but  
16 it seems to me that these laws -- the  
17 two-party laws -- they tend to be a  
18 feature of New England. I don't know how  
19 broadly across the country they're  
20 prohibited.

21 The feds have a one-party law. I  
22 know in New York and New Jersey there's a  
23 one-party law, you don't -- you don't  
24 have this -- you're not criminalizing  
25 tape recording somebody. I think most



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1 states allow it. What is it about New  
2 England states and, you know, what --  
3 what's the genesis of these laws to begin  
4 with?

5 I wonder, you know, when tape  
6 recording first became, you know, was  
7 invented, you know, I can imagine they --  
8 a group of the legislatures at the  
9 type -- of the -- of the -- of the time  
10 in the 1920s, you know, worried about not  
11 having private conversations put on tape.

12 I mean, it seems to me it's  
13 problematic that you can allow testimony  
14 about what happened or what a person  
15 heard, but you can't actually introduce  
16 the best evidence, which is a tape. I  
17 don't like the law; I think the law is  
18 wrong.

19 But I wonder if -- if we could  
20 explore what other states have  
21 experienced. And especially in the area  
22 of DV. I mean, is it common that one-  
23 parties are admitted in, say, California  
24 or Virginia? I don't know. I wonder.  
25 And I wonder what the experience is there





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1 and whether or not there are any  
2 negatives in addition to the possible  
3 positives. It seems to me be it'd be  
4 worth looking at that.

5 And also, I kind of feel like this  
6 law is probably an anachronism. That's  
7 my feeling. And it probably reflected  
8 some of the prejudices and some of the  
9 worries of the legislators in the 1920s  
10 or '30s and maybe needs to be looked at  
11 on that basis as well.

12 JUDGE HANTZ MARCONI: So it looks --

13 MS. LAFRANCE: And I just want to --

14 JUDGE HANTZ MARCONI:

15 (Indiscernible) --

16 MS. LAFRANCE: I want to point  
17 out --

18 JUDGE HANTZ MARCONI: Go ahead.  
19 Yeah.

20 MS. LAFRANCE: Sorry, Judge Hantz  
21 Marconi. I just wanted to point out  
22 too -- I mean, I'm assuming most people  
23 are thinking of cell phone recordings,  
24 but you have to remember too with  
25 technology, there are -- you know, I



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1 have -- I know of a case where there were  
2 recordings from the home security camera.  
3 So -- you know, that trigger  
4 automatically.

5 MR. VICINANZO: Yeah.

6 MS. LAFRANCE: That only start when  
7 somebody -- when, you know, it's a motion  
8 detector. So you know, obviously, the  
9 parties both know the recording -- the  
10 recorder is there. They've consented to  
11 it, presumably, right?

12 So I think in looking into this --  
13 and Amanda, you're right -- I mean, we  
14 make a recommendation. This is much more  
15 than can be done in an hour's Zoom  
16 conversation.

17 But we have to make sure that we're  
18 forward-looking with respect to the  
19 technology. I mean, who knows what's  
20 going -- you know, what the technology is  
21 going to be in two years, five years, ten  
22 years. So I think it would behoove us to  
23 be looking forward with that, too.

24 JUDGE HANTZ MARCONI: All right.  
25 Anything else on that?



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1 MR. VICINANZO: Yeah.

2 JUDGE HANTZ MARCONI: Yes? No? All  
3 right, what next? Judicial  
4 accountability?

5 I can, sort of, set the table.  
6 Current system, we've got the rolling --  
7 every judge is reviewed with a survey  
8 that was developed within the past decade  
9 and half, two decades. Rolling basis,  
10 once every three years, those surveys get  
11 processed and reported. Judicial branch  
12 does an annual report of collated  
13 information, not the exact surveys  
14 themselves. So there's that.

15 Of course there are reports to the  
16 JCC. And there have been various  
17 informal feedback loops, not so much so  
18 recently. But further than that, what  
19 ideas do people have?

20 INV. BERNIER: I think one of the  
21 things that would be helpful is -- and I  
22 can think of a number of glaring issues  
23 we've had over the years. And some of it  
24 usually is it's one or two judges that  
25 have a propensity for some of these



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1 things. There's -- there's no place to  
2 take that issue. When there's a ruling  
3 that may not go along with the law, or  
4 there's a question about the case law,  
5 there's -- there's no annual review type  
6 situation. There's no place to get --

7 JUDGE HANTZ MARCONI: You're talking  
8 about --

9 INV. BERNIER: -- higher --

10 JUDGE HANTZ MARCONI: -you're  
11 talking about --

12 INV. BERNIER: -- authority --

13 JUDGE HANTZ MARCONI: Yep. But  
14 you're talking about beyond, for example,  
15 a motion to reconsider and/or an appeal.

16 INV. BERNIER: Right. You know, or  
17 some of those issues that come up about,  
18 you know, a victim advocate being tossed  
19 out of the court or a decision that comes  
20 down -- and I've had it on non-DV cases  
21 in terms of not getting a search warrant  
22 signed because, you know, the particular  
23 judge thought he saw somewhere that you  
24 can't do X, Y, and Z but couldn't come up  
25 with a cite for it. And as it turned



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1 out, it was inaccurate.

2 And you know, just being able to,  
3 you know, double-check those things or --  
4 or when an order is kind of blatant, that  
5 there's a place to go and say, look, can  
6 this be reviewed?

7 And the AG's office is extremely  
8 limited. There -- there's not -- for the  
9 longest time, we haven't gotten any --  
10 any respite from going through the AG's  
11 office when there have been issues with  
12 bad orders.

13 JUDGE HANTZ MARCONI: How does that  
14 work?

15 INV. BERNIER: And it's impacted a  
16 lot of cases. Hmm?

17 JUDGE HANTZ MARCONI: How does that  
18 work?

19 INV. BERNIER: I thought there was  
20 a --

21 JUDGE HANTZ MARCONI: The AG  
22 procedure. Because I'm not familiar with  
23 it.

24 INV. BERNIER: I just remember one  
25 of the -- we had a recent case where the



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1 prosecutor ended up calling the AG's  
2 office. Because that was her -- and  
3 she'd been a prosecutor forever. And  
4 don't know -- even know who she called.  
5 I don't know whether it was a -- that was  
6 the understanding --

7 MR. ENDRES: I might be able to help  
8 out with that. The attorney general's  
9 office has a solicitor general now. So  
10 there is an appeals process where if you  
11 are interested in bringing a state's  
12 appeal, there's a form you fill out. You  
13 send it to the solicitor general. They  
14 review the case and essentially issue you  
15 a decision of whether or not that's an  
16 appeal they're willing to take.

17 JUDGE HANTZ MARCONI: Okay.

18 MS. ZINKIN: So that would be a case  
19 where --

20 JUDGE HANTZ MARCONI: The AG's  
21 office isn't calling the court, it's a --  
22 it's a process for appeal.

23 INV. BERNIER: Right.

24 MS. ZINKIN: It's a process for the  
25 state to bring an appeal where the



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1 (indiscernible) --

2 MR. ENDRES: Correct.

3 INV. BERNIER: -- has prevailed.

4 MR. ENDRES: The difficulty, though,  
5 is -- I mean, obviously, judges are  
6 people, and a lot of them have certain  
7 personalities.

8 And I think that you'll find there  
9 are -- you know, you might find a judge  
10 who doesn't like guns, or a judge who  
11 doesn't like domestic violence, or a  
12 judge who doesn't necessarily see a lot  
13 of, sort of, power in victims of domestic  
14 violence. And you'll get rulings that  
15 maybe in your opinion are bad, but they  
16 don't violate the law.

17 When a judge makes a finding that  
18 somebody's not guilty, there's -- there's  
19 nothing you can do about that. And I've  
20 certainly had the experience in domestic  
21 violence cases where the judge has found  
22 the defendant not guilty and then  
23 proceeded to lecture the victim on why  
24 they shouldn't have, sort of, brought  
25 this to the court to begin with.



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1           And there is nothing that I can  
2           necessarily do as a prosecutor in that  
3           position because the law hasn't been  
4           violated, it doesn't necessarily violate  
5           the judicial conduct rules. It's simply,  
6           sort of, a bad decision. And I think  
7           that's --

8           JUDGE HANTZ MARCONI: Well, the  
9           decision -- I guess I'm hearing two  
10          things. If it's a bad decision, I don't  
11          know that there can or should be anything  
12          other than our system sets forth the  
13          opportunity for reconsideration and  
14          appeal.

15          What raises my red flag is lecturing  
16          a litigant in a failed case. For  
17          example, when I was litigating, you win  
18          some, you lose some -- fifty-one percent,  
19          forty-nine percent, you're not there.  
20          But lecturing a victim, I'm not sure  
21          there's justification for that. But  
22          that's a -- that's a different question  
23          than a bad decision that is within the  
24          bounds of the law.

25          INV. BERNIER: Um-hum.





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1 JUDGE HANTZ MARCONI: Does that make  
2 sense?

3 MR. ENDRES: It does make sense.  
4 But I think that they're somewhat  
5 interrelated in the sense of --

6 INV. BERNIER: Um-hum.

7 MR. ENDRES: -- I understand I win  
8 some and I lose some. But if I'm losing  
9 a lot in front of a particular judge,  
10 that may be concerning to me.

11 If -- for example, I had a domestic  
12 violence case where the victim had  
13 testified that this was her boyfriend.  
14 She had testified that she was moving her  
15 clothing out of the apartment. The  
16 police had testified when they made  
17 contact with him, he referred to the  
18 victim as his girlfriend. And the court  
19 found that I didn't prove there was an  
20 intimate relationship. And when I read  
21 the definition of intimate partners to  
22 the court, the response I got was dating  
23 can mean different things to different  
24 people.

25 And that was something that occurred



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1 not just in a single case, but I found  
2 happening in other cases as well, this  
3 sort of -- I guess I didn't explicitly  
4 ask if they were in a sexual  
5 relationship. But I would think getting  
6 in evidence that people are dating, are  
7 boyfriend and girlfriend, share an  
8 apartment, would certainly get over that  
9 hump. And when you're getting those same  
10 decisions from one or two particular  
11 judges, I think that's troubling.

12 MS. ZINKIN: But is that something,  
13 though, that you could have appealed if  
14 wanted to? Because, you know, perhaps  
15 the judge was misapplying the law of what  
16 an intimate partner is.

17 MR. ENDRES: But the problem is that  
18 as soon as the judge says not guilty,  
19 it's not something the state can appeal  
20 because jeopardy is attached --

21 MS. ZINKIN: Right.

22 MR. ENDRES: -- as soon as we  
23 started the trial.

24 MS. ZINKIN: Right.

25 MR. ENDRES: So the AG's office



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1 won't even look at that, and there's no  
2 aspect to appeal that.

3 MS. ZINKIN: Got it.

4 MR. ENDRES: So you're essentially  
5 left shrugging your shoulders and saying,  
6 well, that's a bad decision. And then --

7 JUDGE HANTZ MARCONI: So actually  
8 you're drilling down to a set of cases  
9 where there is no appeal.

10 MR. ENDRES: Right.

11 JUDGE HANTZ MARCONI: And so really  
12 what you're looking at is perhaps -- I  
13 don't know how I say this -- a -- where  
14 there's an interpretation by a judge, no  
15 avenue of appeal, but you have sort of a  
16 consistent misinterpretation, what do you  
17 do with that? In your view, if you have  
18 a consistent misinterpretation, where do  
19 you go?

20 INV. BERNIER: And --

21 MR. ENDRES: And I don't know if  
22 there is anywhere you can go, is the  
23 problem. And I've certainly -- and I  
24 mean, it's not -- that's not something  
25 that's limited to domestic violence



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1 cases.

2 I mean, there are -- there are  
3 judges who find no one's ever driving  
4 drunk. And there are judges that find  
5 everyone's -- are driving drunk. And  
6 that's just those judge's personalities.  
7 So you -- you hope you're not in front of  
8 one of those judges if you have a DWI  
9 case, depending on what side you're on.

10 But it seems like if -- if there is  
11 some level of consistency in terms you  
12 win some, you lose some, I shouldn't be  
13 consistently winning or consistently  
14 losing.

15 INV. BERNIER: I liken it to the  
16 concept for us in law enforcement because  
17 we have rules and regulations for  
18 everything. You can look at someone the  
19 wrong way, and that can be a violation of  
20 some rule or reg.

21 Implicit bias was a really big deal,  
22 and I think that's part of it. And I --  
23 it's not -- when Steve talks about you  
24 get these one or two judges, you don't  
25 have a judge that, you know, it -- that



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1 will, you know -- occasionally everybody  
2 makes an error in judgment. But you'll  
3 have consistently that particular judge  
4 will have a certain bias or perception on  
5 particular cases.

6 Child sexual assault images were a  
7 really big problem because a number of  
8 judges -- old-school judges -- when we  
9 started ICAC cases, didn't see it as --  
10 they saw it as a victimless crime because  
11 there was no understanding. So it was  
12 like a -- it's not bad. It's not like a  
13 hands-on offense. You see it with  
14 judges. I've had, you know, old judges  
15 in the past who would be, like, you know,  
16 what goes behind closed doors stays  
17 behind closed doors.

18 But when you have these types of  
19 decisions -- like Steve's talking  
20 about -- you can pin it down to the  
21 specific judges because it kind of  
22 filters through a lot of the stuff that  
23 they do. And there is no recourse for  
24 that. When you have a judge put in an  
25 order you know what, I'm going to buy the



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1 fact that this was self-defense. Next  
2 time, don't put your hands around their  
3 neck kind of thing. And it was a  
4 strangulation case. Well -- or you know  
5 what, you know, it's almost sexual  
6 assault. Next time, don't do this.  
7 Because it -- you're really walking the  
8 fine line. That's -- that's problematic.  
9 And it's not just a decision here or  
10 there, it's consistent in that particular  
11 courtroom --

12 JUDGE HANTZ MARCONI: It's  
13 interesting --

14 INV. BERNIER: -- for these cases.

15 JUDGE HANTZ MARCONI: -- because I'm  
16 hearing that in the domestic violence on  
17 the civil side, you would have a remedy  
18 or at least some recourse. You would  
19 have a motion to reconsider, you would  
20 have an appeal issue. But you don't have  
21 that on the criminal side.

22 MS. KRUEGER: I would just say on  
23 the civil side that is -- that is true,  
24 right? You have the opportunity to  
25 appeal. It's certainly a more difficult



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1 appeal if it's an unsustainable exercise  
2 of discretion, right? And -- which it  
3 may be when you're talking about, like, a  
4 continuum of how a judge may interpret  
5 certain facts. So I would --

6 JUDGE HANTZ MARCONI: Right. You  
7 might have -- I mean, the fact of the  
8 relationship stands on different footing  
9 than other, I'll say, more discretionary  
10 decisions about timing, duration, those  
11 sorts of things.

12 MS. KRUEGER: Right. And then  
13 there's credibility. And that, you  
14 know -- you know -- and if there's a --  
15 if there's a particular judge who seems  
16 to have more skepticism towards people  
17 who are coming forward as victims, and  
18 you see that on a regular basis, that's a  
19 harder thing because it will appear in an  
20 order. Even if an order's, you know, may  
21 just be a check box thing. But if  
22 there's a merit that accompanies it and  
23 there's any mention of credibility, you  
24 know -- you really -- that's not worth  
25 appealing, right?



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1           So -- but the other point of that is  
2           if a protection order's denied -- and I  
3           found that this was in the report -- why  
4           don't more plaintiffs appeal their cases.  
5           Well, if there's no protection order in  
6           place, you know, ninety percent of the  
7           time the victim is not going to appeal  
8           that for a variety of reasons, safety  
9           being one. And so that is a real barrier  
10          for victims in particular in deciding --  
11          even it if it's an obvious legal error --  
12          to move forward with an appeal. So I  
13          just want to point that out.

14                JUDGE HANTZ MARCONI: Right. And so  
15           it's interesting because those are the  
16           cases that could affect the law, if you  
17           will. And so maybe the challenge is -- I  
18           mean, again, thinking big -- but how do  
19           you provide that additional resource to  
20           allow for appeals?

21                JUDGE YAZINSKI: The thoughts I had  
22           in that regard --

23                JUDGE HANTZ MARCONI:  
24           (Indiscernible) throughout. So yeah. Go  
25           ahead.





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1 JUDGE YAZINSKI: One of the things  
2 that I thought about in this regard over  
3 the last few weeks is amending the  
4 statute -- when we get around to the  
5 statue -- to provide for an appeal that  
6 stays the existing temporary order and  
7 also is expeditated much the way we  
8 expedite abuse and neglect appeals.  
9 Because I agree with Mary that it is  
10 extraordinarily intimidating both to lose  
11 and then to have to turn around and file  
12 an appeal that might not get heard for a  
13 year while you have no protection.

14 But if we recognize that these  
15 appeals are extraordinarily important and  
16 hearing them timely is important, now  
17 going the line of the abuse and neglect  
18 system where appeals get heard quickly  
19 might be something to look at.

20 JUDGE HANTZ MARCONI: And  
21 particularly if it stays the temporary  
22 order or keeps the temporary order in  
23 place.

24 INV. BERNIER: In addition to that,  
25 even in -- I mean, like -- again, a lot



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1 of us, we all have oversight. We all  
2 have an immediate supervisors. We all  
3 have that layer of -- I call it the food  
4 chain. Even if there was, you know, a  
5 denial that there some type of an  
6 automatic -- kind of like NFL does with  
7 touchdowns and everything under the two-  
8 minute warning, you know. And call New  
9 York and have them take a look at the  
10 video type of thing.

11 If there's a denial, having  
12 something set up so that there is a quick  
13 ability to review -- with exactly what  
14 the judge just said now -- and having  
15 that time frame, you know -- keeping the  
16 order as-is until that little review  
17 process happened might be something to  
18 consider.

19 JUDGE HANTZ MARCONI:  
20 (Indiscernible) -- general kind of  
21 thing --

22 MS. LAFRANCE: Yeah. Here's --  
23 here's my thought on that. Kristyn,  
24 that's a great idea. Why couldn't it be  
25 akin to something like sentence review



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1 for felony sentences?

2 You have a panel of three judges  
3 that hears -- right? I mean, Merrill,  
4 you're very familiar with this.

5 You know, it would be reviewable  
6 by -- it could either be three district  
7 court, family court, judges or even  
8 superior court judges like sentence  
9 review is now. And if, you know, two out  
10 of three of those judges feel that the  
11 denial was incorrect, then the  
12 restraining order gets reinstated.

13 JUDGE HANTZ MARCONI: Interesting.

14 INV. BERNIER: And not even -- but  
15 not even necessarily to that extent where  
16 you're tying up three other people but  
17 just that one level of -- even if there  
18 was, you know, each area, county, or  
19 however it works is someone's earmarked  
20 to just review those. It wouldn't  
21 necessarily need to be a two out of a  
22 three.

23 Just getting that, kind of, second  
24 opinion kind of thing. You know, just  
25 like we all do when -- you know, if I do



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1 an arrest warrant or search warrant,  
2 somebody's putting eyes on it. Did I  
3 miss anything? And I think that would  
4 really, potentially, cut down on a -- on  
5 a lot of problems or prevent something  
6 from happening. By just that other set  
7 of eyes.

8 MS. ZINKIN: I just wanted to let  
9 people know that appeals of DV orders and  
10 appeals of civil stalking orders are  
11 expedited already.

12 JUDGE HANTZ MARCONI: There's  
13 expedited and then there's expedited,  
14 right?

15 MS. ZINKIN: Tim just came to my  
16 office. So according to -- Tim Gudas,  
17 our clerk of court, they're expedited.

18 JUDGE HANTZ MARCONI: And I will  
19 just tell everyone here that even though  
20 we expedite, that has a meaning in our  
21 process that may not be what y'all are  
22 thinking of. So yes. But Tim is right;  
23 they are expedited. But we may need to  
24 put our running shoes on.

25 MS. LAFRANCE: But the issue with --



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1 JUDGE HANTZ MARCONI: --

2 (indiscernible) --

3 MS. LAFRANCE: The issue with  
4 appeals, though, is they are so  
5 expensive, and they are so time  
6 consuming. That's the reason why they  
7 don't appeal, because they don't have the  
8 money.

9 JUDGE HANTZ MARCONI: Right. And  
10 then you're getting in to appointed  
11 counsel for that or the appellate DOVE  
12 program.

13 INV. BERNIER: But I think you're  
14 also -- people that probably don't even  
15 realize they can appeal it.

16 JUDGE HANTZ MARCONI: Right.

17 INV. BERNIER: You know, we're in  
18 the system all the time, and there's  
19 stuff that I'm learning thirty years in,  
20 and I'm still learning things. And for  
21 somebody to walk into the system -- you  
22 know, I grew up if a judges say X, the  
23 judge means X, and that's -- that's the  
24 truth. And that's, you know, that's I  
25 think a lot of the perception. So --



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1 MS. ZINKIN: Although the notice of  
2 order should tell them specifically that  
3 they have the right to appeal, so --

4 JUDGE HANTZ MARCONI: Yeah but --

5 INV. BERNIER: People don't read  
6 things --

7 JUDGE HANTZ MARCONI: -- again,  
8 there's paperwork. Yeah, there's  
9 paperwork, and then there's paperwork.  
10 And how many people here read their  
11 mortgage document or their lease. I  
12 mean, their car, you know -- purchase a  
13 car, who reads those papers? Nobody. So  
14 yeah. It is true people know they can  
15 appeal, but I think the reality is the  
16 system is not conducive to people really  
17 knowing how to do that.

18 MS. ZINKIN: Other than sentence  
19 review, is there any other, kind of,  
20 system that we have where there's some  
21 kind of, short of an appeal, review of a  
22 trial court's decision?

23 MR. ENDRES: Absolutely. In bail,  
24 if a bailiff commissioner makes a  
25 decision, there's a statutory right to



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1 appeal it to a circuit court judge. And  
2 if you don't like the circuit court  
3 judge's ruling, there's a statutory  
4 appeal to superior court. And usually, I  
5 think it's within thirty-six hours by  
6 statute. So --

7 MS. ZINKIN: So would this require  
8 statutory amendment, you think?

9 MR. ENDRES: It absolutely it would  
10 require a statutory amendment to do  
11 either an appeal to superior court or  
12 even, I think, a sentence-review-type  
13 thing with a three-judge panel. I think  
14 all that would require a legislative  
15 amendments that -- and I mean, obviously,  
16 we're a judicial task force.

17 I think that the -- the judicial  
18 branch could come up with some type of  
19 oversight over sitting judges that are  
20 currently sitting without any legislative  
21 input, but that would require, I think, a  
22 lot of thought by the part of the  
23 judiciary.

24 JUDGE HANTZ MARCONI: Well, the  
25 judicial branch can review -- there's



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1 some things we can review and some things  
2 we can't review. And -- or let me put it  
3 this way, there's a process for reviewing  
4 individual decisions that we can't undo  
5 without modifying that process though the  
6 legislature because they give us -- they  
7 grant us our jurisdiction, except for  
8 certain inherent jurisdiction, which we  
9 have.

10 There are also -- and I think the  
11 protocols are an attempt to deal with  
12 that process issue, which is very much  
13 within the wheelhouse of the judicial  
14 branch. But the judges being  
15 constitutional officers appointed by the  
16 governor, approved by the council,  
17 they're all their own authority, if you  
18 will, within the confines of the branch  
19 review process. So some yes, and I think  
20 I'm anticipating -- but we're going to  
21 look into it -- some yes, and some no.

22 INV. BERNIER: With regard to some  
23 of the -- with reviews -- and now I think  
24 a lot of it is because judges are wearing  
25 multiple hats because they're doing





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1 civil, they're doing juvie, they're doing  
2 DV, they're doing criminal. You have a  
3 huge caseload, people filing paperwork  
4 for X, Y, and Z.

5 Some of the stuff that we might be  
6 looking for -- which again, might be just  
7 another set of eyes built into the  
8 system -- we're seeing also more and more  
9 taking things under advisement. So I've  
10 seen, you know, final DV orders being  
11 taken under advisement. And I don't know  
12 the, you know, the legal ins and outs of  
13 how long that -- but obviously the order  
14 stays in place until the order comes down  
15 for a petition. But that could all --

16 I've seen that also in criminal  
17 cases. So you have a judge who'll go,  
18 okay, you know, I need to go back and  
19 review. I've seen it on PC hearings,  
20 I've seen it on anything. I want to go  
21 back, and I want to double check and look  
22 things up. That maybe the point for that  
23 second set of eyes on some of those  
24 things so that you don't end up with  
25 legislative changes. You don't end up



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1 with appeals.

2 A lot of judges are taking things  
3 under advisement now anyway. Something  
4 that might be instituted that isn't going  
5 to mess around with Constitutional rights  
6 and due process and all that other legal  
7 stuff that I don't have a law degree to  
8 discuss.

9 JUDGE HANTZ MARCONI: Well, and it  
10 may be you're right. There may be a  
11 point of collaboration that could be  
12 built into the system. I don't know.

13 MS. SEXTON: But if there are  
14 consistent complaints against specific  
15 judges relative to their conduct in  
16 domestic violence-related cases, the  
17 courts can remove them from domestic  
18 violence -- sitting on domestic violence  
19 cases. Is that correct?

20 MS. ZINKIN: I don't think so.

21 JUDGE HANTZ MARCONI: I don't know.

22 MS. ZINKIN: They're circuit court  
23 judges.

24 JUDGE HANTZ MARCONI: I don't think  
25 so.



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1 MS. ZINKIN: I think by statute I  
2 have to hear all the cases that come up  
3 at the circuit court.

4 MS. SEXTON: I think we should look  
5 into that.

6 MS. ZINKIN: And the circuit court  
7 is a statutory court, it only has  
8 jurisdiction as granted to it by the  
9 legislature.

10 MS. SEXTON: But there are other  
11 matters within the circuit court that  
12 the -- that judge could be sitting on.

13 JUDGE HANTZ MARCONI: Sure.

14 MS. SEXTON: I think it's something  
15 with should look into.

16 MS. ZINKIN: Um-hum.

17 JUDGE HANTZ MARCONI: And also the  
18 process for vetting and collecting those  
19 reported incidents, you know. You've got  
20 to be able to understand the context. It  
21 gets unwieldy -- and I'm just  
22 speculating -- but you have to understand  
23 the context to understand the impact to  
24 the parties and the behavior you're  
25 talking about.



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1           So that is a -- I don't know about  
2           removal, I think that could be invading  
3           some level of authority, but it's worth  
4           looking at.

5           INV. BERNIER: But if some of those  
6           issues -- and again, in my personal  
7           experience, and others are different -- I  
8           can narrow it down to, you know, a couple  
9           judges here and there that have specific  
10          things that they do and don't do or  
11          specific beliefs.

12          If those -- if there is an avenue to  
13          address that stuff, to either head it  
14          off -- either with training or review or  
15          whatever it is -- it doesn't end up  
16          rising to the level of removing a judge  
17          from something. It's about nipping it in  
18          the bud, so to speak, and having the  
19          avenue to address those things. And --

20          JUDGE HANTZ MARCONI: So what do we  
21          think about --

22          INV. BERNIER: -- no -- again, no  
23          different than you do in my position --  
24          my profession.

25          JUDGE HANTZ MARCONI: What do we



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1 think about the avenue to address it? A  
2 type of -- not a survey once every couple  
3 of years, but a type of feedback, comment  
4 line, complaint form, what are we  
5 thinking about?

6 MS. BEAUCHAMP: Is there maybe an  
7 opportunity here to create some sort of  
8 maybe short evaluation form for victims,  
9 advocates, attorneys who are assisting  
10 victims, to just evaluate their  
11 experience with obtaining or applying for  
12 a temporary order? And then perhaps  
13 another form for the final order hearing.

14 Something that maybe just addresses,  
15 like, walking into the court and, you  
16 know, having a helpful clerk assist you  
17 with deciding which is the right  
18 petition. Did you -- were you given a  
19 private space to complete your petition?  
20 What was the experience like in the  
21 courtroom? Just something, and then, you  
22 know, some sort of procedure to collect  
23 this information and document it.

24 I think early on someone had  
25 discussed the importance of data, and it



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1 really is important. I think that kind  
2 of goes along the lines of having a  
3 petition that has some fillable formats  
4 that we can actually pull the information  
5 out of and it's meaningful information.  
6 And it's not just whether the order was  
7 granted or not, but you know, was there a  
8 firearm issue? Were children -- was  
9 there a request for, you know, something  
10 related to the children in it? I just  
11 think this information would help us to  
12 track going forward.

13 I mean, we've heard anecdotally what  
14 the issues are and the concerns, but if  
15 there were a mechanism to actually  
16 collect the data and then support the  
17 fact that, yes, we need more training for  
18 judges. We need more training for the  
19 staff in the court.

20 JUDGE HANTZ MARCONI: That would  
21 work, I think. I like the idea. Sort of  
22 an exit interview on leaving the  
23 courthouse.

24 If there's an advocate, I suspect  
25 you would get a response. I don't know



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1 if we would capture all the self-  
2 represented parties who are going to  
3 leave and either give up or not or go  
4 about their business, but it's a start.  
5 And I think it's a -- sounds like an  
6 interesting way to collect more  
7 information.

8 INV. BERNIER: On a different note  
9 with regard to, say, that specific  
10 potentially hair-raising order -- and  
11 I -- I have a greatest -- I call it my  
12 greatest hits compilation of a number of  
13 these. But say a judge orders, you know,  
14 a felony bail hearing for the defendant,  
15 puts in the order something to the effect  
16 of and I recommend that the -- I don't  
17 want to break up this couple -- and I  
18 recommend that the victim, you know,  
19 might want counselling. I -- that -- I  
20 lose my mind when I see stuff like that.

21 Or an order that -- just the  
22 verbiage or the decision -- where would  
23 one go to have that looked at? That's  
24 the other avenue, you know. Something  
25 comes down, is there a, you know -- I



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1 know I can pick up a phone and  
2 commiserate with someone else about it.  
3 But if there's something that, you know,  
4 that doesn't belong in a bail order, so  
5 where does one go with that? That's  
6 another avenue that isn't accessible.

7 JUDGE HANTZ MARCONI: So the state  
8 wouldn't -- and again, you're in -- I'm  
9 sort of trying to test this out -- the  
10 state wouldn't then say, wait a minute,  
11 Your Honor, that's not appropriate for  
12 the bail order. Would you reconsider and  
13 drop that? And here are all the reasons  
14 why it's not appropriate.

15 INV. BERNIER: But for instance,  
16 where -- is there a place to do that now?  
17 And is that something that we can --  
18 because for all these years that I've  
19 been doing it, I couldn't tell you where  
20 I would pick up the phone and go, hey, I  
21 have a problem with an order here. Other  
22 than calling other colleagues or  
23 prosecutors or, you know, advocates and  
24 going, what do we do as a group and who  
25 do we take this to.





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1 JUDGE HANTZ MARCONI: Steve --

2 Steve --

3 INV. BERNIER: That's been a real  
4 frustration.

5 JUDGE HANTZ MARCONI: Steve, tell  
6 me, if you get a bail order is there a  
7 reconsideration opportunity?

8 MR. ENDRES: Yeah, you could  
9 certainly file a motion to reconsider a  
10 bail order like that.

11 JUDGE HANTZ MARCONI: Right.

12 MR. ENDRES: And depending which  
13 court issued the order, if it was issued  
14 out of a circuit court, you could appeal  
15 that to the superior court, again, for  
16 that hearing within thirty-six hours.

17 JUDGE HANTZ MARCONI: Right.

18 MR. ENDRES: The state and the  
19 defense have that right to appeal. And  
20 you can appeal bail orders to the Supreme  
21 Court, and the statute says they shall be  
22 determined promptly. Which, again, I  
23 think promptly in Supreme Court terms  
24 means within, like, three months, as  
25 opposed to within thirty-six hours.



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1 JUDGE HANTZ MARCONI:

2 (Indiscernible).

3 MR. ENDRES: There is certainly a  
4 right to appeal bail orders.

5 JUDGE HANTZ MARCONI: Right. And so  
6 if there was a bail order that was  
7 inappropriate with respect to the  
8 complaining witness, you would be able to  
9 deal with that through that process?

10 MR. ENDRES: There is an avenue of  
11 appeal for bail orders.

12 JUDGE HANTZ MARCONI: Right. It  
13 would just be a priority in terms of  
14 resources whether you're going to  
15 basically bother with that, right?

16 INV. BERNIER: Exactly. There's  
17 no --

18 MR. ENDRES: Well, again, the county  
19 attorneys can't bring appeals, they all  
20 have to go through the attorney general's  
21 office. So --

22 JUDGE HANTZ MARCONI: Right.

23 MR. ENDRES: -- you'd have to get  
24 the attorney general's office to be on  
25 board with that.



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1 JUDGE HANTZ MARCONI: Yep.

2 MS. KRUEGER: But the question is --

3 MS. HORNICK: But the point is,  
4 though -- go ahead.

5 MS. FREEMAN: Those type of concerns  
6 do get brought to the domestic violence  
7 program manager, and that can help inform  
8 what types of training is done for staff  
9 and judges. So that's another avenue if  
10 the end goal in that particular case is  
11 to try to get information to be geared  
12 towards training, that is the avenue to  
13 get that information to the judicial  
14 branch.

15 JUDGE HANTZ MARCONI: And that's  
16 currently --

17 MR. ENDRES: Well --

18 JUDGE HANTZ MARCONI: -- that  
19 currently goes to Jean through the -- her  
20 phone, her email, through her contact  
21 information, so anybody -- maybe we have  
22 to publicize this more -- can route that  
23 information through the DV program  
24 manager for it to be addressed by the  
25 circuit court, if you will.



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1 MS. FREEMAN: That's accurate.

2 MR. ENDRES: Well --

3 MS. HORNICK: Kristyn was talking  
4 about felony bail, though; weren't you,  
5 Kristyn? So the limited number of  
6 superior court judges? Wasn't that --

7 INV. BERNIER: That was -- that  
8 particular case was felony. And again,  
9 same type -- same judge that we had a  
10 number of those issues with. But that  
11 was just one. I have a bunch of  
12 examples. But that's an example of one  
13 of those, like, A, it shouldn't be there;  
14 it's not the appropriate place for it.  
15 The attitude of I don't want to break up  
16 the marriage type of thing with a  
17 strangulation case, and a defendant  
18 that's, you know, fifteen years older  
19 than his nineteen-year-old victim.  
20 What's the avenue?

21 The kid who's the victim isn't  
22 certainly going to push for it.  
23 Everybody's judges are tied up and  
24 prosecutors are tied up. And there's  
25 just no place to take that but to stick



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1 in a file of here we go again. And have  
2 it addressed in some way.

3 MS. HORNICK: I would just -- if  
4 it's a -- I mean, superior court's a  
5 whole different story. It feels like  
6 there's a, you know, a -- I mean, with  
7 all due respect to all of these people,  
8 all these stakeholders that we're talking  
9 about -- yeah, shoot.

10 I think when you get into superior  
11 courts since it's such a limited -- I  
12 mean, there's -- there's motions to  
13 reconsiders, there's records to be  
14 created, there's more witnesses to be  
15 called.

16 So I don't -- I mean, again, you  
17 might be talking about the lack of the  
18 oversight or accountability, that I don't  
19 know -- I don't know -- that is -- seems  
20 to be an issue, kind of, across the  
21 board.

22 But gosh, I also -- this is going to  
23 sound weird, but I don't -- I've had  
24 many -- not many -- several calls and  
25 complaints from law enforcement and



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1 others about judge's orders. Not just in  
2 the county where I am -- Grafton  
3 County -- but, you know, across the  
4 state. And I've wondered about, sort of,  
5 oversight and accountability. Because it  
6 seems like a real necessity across the  
7 board.

8 But I also don't want to paint this  
9 broad brush that all judges are bad.  
10 It's just that there isn't any -- it  
11 doesn't seem like there's any way to hold  
12 any judges --

13 INV. BERNIER: Exactly.

14 MS. HORNIC: And I mean -- so I  
15 don't know what the answer is, Justice  
16 Marconi, but at -- but it does seem like  
17 there's -- there's that piece somehow  
18 that's, kind of, calling  
19 (indiscernible) --

20 JUDGE HANTZ MARCONI: Do people not  
21 credit or not pay attention to or not  
22 participate in the every-three-year  
23 review? I mean, is that just something

24 MS. SEXTON: No, it's --

25 JUDGE HANTZ MARCONI: -- that nobody



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1 pays attention to except the judges who  
2 are --

3 MS. SEXTON: Yeah, it's not highly  
4 publicized. I don't think there's an  
5 effort to really seek input.

6 But I also think there's a lack of  
7 understanding about what that entails.  
8 You know, are there -- is there -- are  
9 there -- is there data collected on each  
10 judge in order to be able to compare --  
11 like for instance, temporary orders,  
12 relinquishment of a firearm is optional.  
13 Most judges will order relinquishment.  
14 Is there some sort of data that's  
15 collected to determine how often judges  
16 are or are not doing that.

17 Is there some sort of basic  
18 performance measures in order to, you  
19 know, have, sort of, an objective look at  
20 performance in addition to trying solicit  
21 input from, you know, parties and other  
22 people who are working within the system.  
23 So I'm not even sure what that looks  
24 like. Is there --

25 JUDGE HANTZ MARCONI: Well, it's



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1 interesting because I think the survey  
2 that was -- I mean, certainly the survey  
3 that was developed way back when was  
4 dealing with performance of judging in  
5 general.

6 I don't think at this point there's  
7 been any data collection in terms of  
8 outcomes, which could be -- I'm only,  
9 again, kind of, thinking ahead -- but  
10 drawing -- there's correlation and then  
11 there's causation. And drawing  
12 conclusions from outcomes with all --  
13 it'd be an interesting process because  
14 you look at what types of cases happen  
15 before a certain judge, who the parties  
16 are, what the evidence is, before you  
17 start drawing -- drawing conclusions from  
18 sheer data.

19 So that, to me, would be -- it's  
20 like any survey. You'd have to control  
21 for many variables. But I don't think at  
22 that point this -- that sort of data  
23 tying outcomes to specific judges or  
24 geographic locations or anything else has  
25 been done.





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1 JUDGE CARBON: So Justice Marconi, I  
2 don't think that we -- with the judicial  
3 surveys that go out, you know, maybe an  
4 idea is to disseminate it more broadly.  
5 It does go in Bar News, and I don't know  
6 where else it's publicized --

7 JUDGE HANTZ MARCONI: Right.

8 JUDGE CARBON: -- but the intent is  
9 to capture perceptions.

10 JUDGE HANTZ MARCONI: Yes.

11 JUDGE CARBON: And they do break it  
12 down by category.

13 JUDGE HANTZ MARCONI: Yes.

14 JUDGE CARBON: What it does not  
15 do -- and what I'm not sure would be  
16 appropriate to do -- is to say, did this  
17 judge exercise his or her discretion to  
18 take firearms or not, when it's within  
19 the purview of the law to do it or not do  
20 it, depending on the facts of a case.

21 JUDGE HANTZ MARCONI: Right.

22 JUDGE CARBON: And there's no survey  
23 that you're going to get into that's  
24 going to try to disaggregate that kind of  
25 information. But what I do think --



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1 JUDGE HANTZ MARCONI: Right.

2 MS. SEXTON: Well, if you want to  
3 fight bias --

4 JUDGE CARBON: Oh, excuse me. Let  
5 me finish, if I may.

6 JUDGE HANTZ MARCONI: Yes.

7 JUDGE CARBON: Couple of things that  
8 we could do here. We did do surveys way  
9 back at the family division, and so  
10 there's a model and a template for doing  
11 public surveys there.

12 Another suggestion might be that we  
13 look at a court watcher program that lots  
14 of jurisdictions around the country have.  
15 They monitor not only judicial conduct  
16 but clerks, law enforcement, advocates,  
17 everybody within the context of the  
18 courtroom. So it's an observation  
19 process on how the collective entire  
20 system is working. So that's something  
21 to look at.

22 This also gets to an issue that  
23 Kristyn raised in her email that I don't  
24 want us to lose before we close today,  
25 which is firearms. And that's a whole



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1 big range of different issues about the  
2 statute, about how orders are served,  
3 what the forms contain in terms of  
4 information that we gather from victims,  
5 when they apply. Do they necessarily all  
6 want their firearms to be surrendered.  
7 Lots of states don't have an automatic,  
8 kind of, provision in their form. We  
9 happen to. And so they, you know -- we  
10 can check it or not check it. We have  
11 the ability to take them depending on the  
12 facts of a case.

13 We don't have provisions built in  
14 for a return of service to track what  
15 firearms were identified. We don't ask  
16 that specific detail in any kind of a  
17 form. You know, when asking victims if  
18 they want firearms surrendered and if  
19 they can identify them, great, but we  
20 don't give them a tool that -- there are  
21 organizations that have tools that would  
22 help them identify what they are.

23 We don't track which ones were  
24 surrendered, which ones weren't  
25 surrendered. There's a whole bunch of



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1 information around that and a safer  
2 service of process (indiscernible)  
3 process and return back to the court that  
4 we could be doing.

5 There's lots of -- you know, we  
6 don't have time to get into the whole  
7 myriad issues that surround firearms.  
8 But there's a lot that could be done  
9 through the courts, through law  
10 enforcement, through advocates, and I  
11 would suggest that that get put in our  
12 bucket, too -- the addressing.

13 INV. BERNIER: And dovetailing on  
14 what Judge Carbon said, this is another  
15 one of those issues. That it's not just  
16 about -- yes, our focus is judicial  
17 system, but at every level there is an  
18 opportunity for things to fall through  
19 the cracks.

20 So a judge orders weapons to be  
21 seized, you've got a plaintiff who may  
22 put the information about exactly  
23 where -- Missy Charbonneau's a perfect  
24 example -- where those weapons are. And  
25 the judge is doing their thing, the



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1 victim gave the information, and then it  
2 falls apart at another level. So when  
3 we're looking at some of these issues, we  
4 really need to be looking at how they all  
5 interplay because the work has to be  
6 done, kind of, across the board.

7 And this is one of those things  
8 where no matter -- you know, you go to  
9 different counties, you could look at  
10 different agencies, different levels of  
11 training. You know, certain agencies  
12 that may serve something that isn't the  
13 agency that actually has the case. It's  
14 kind of terrifying when you see what  
15 actually goes on and what doesn't -- what  
16 should be going on and -- in regard to  
17 those weapons issues.

18 JUDGE CARBON: Just even to add to  
19 that, if I could, we have situations  
20 where a victim may identify a particular  
21 firearm because that may be the only one  
22 she knows about. So law enforcement may  
23 take that gun, how do we know that the  
24 defendant doesn't have a bunch of other  
25 ones if we don't have a system for



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1 inquiring and then following up.

2 And what happens if they don't  
3 surrender them? What's our follow-up?  
4 What if they give them to third parties?  
5 I mean, there's so many different issues  
6 that we really could peel down on and I  
7 think as a whole do a more responsible  
8 job to make communities safer.

9 MS. SEXTON: But I think in terms of  
10 the judiciary, if a particular judge  
11 sixty percent of the time is not checking  
12 the box to relinquish a firearm in  
13 temporary orders -- and I'm not saying  
14 that's the case -- but we should know  
15 that. Especially when it comes to the  
16 point of the three-year review. And I  
17 think there just needs to be objective  
18 data in order to determine that we're on  
19 the right track.

20 JUDGE HANTZ MARCONI: But how do you  
21 draw a conclusion from that sixty  
22 percent?

23 MS. SEXTON: You review it. You  
24 have to spend time reviewing it. So if  
25 it's an actual three-year review, you use



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1 objective measures and you take the time  
2 to look at if one judge is sixty percent  
3 and the rest are ten percent, then that's  
4 going to give you an indication that  
5 that's something you need to delve deeper  
6 into. And maybe it's a fluke. But it's  
7 absolutely worth looking into.

8 JUDGE HANTZ MARCONI: Anything else?  
9 On any topic?

10 INV. BERNIER: I think it'd be  
11 really -- you know, again, coming from  
12 the law enforcement side of things. Some  
13 of these things -- for instance, the  
14 firearms, the -- you know, service --  
15 there's some really good opportunities  
16 for -- I don't know if training's the  
17 right word, yeah, training comes into  
18 play -- but some interactive things where  
19 you have prosecutors and judges and cops  
20 and advocates kind of learning at the  
21 same table. Not just judges being  
22 trained in, you know, in their thing and  
23 cops being trained in their little world,  
24 but the perspective is something that we  
25 all need to be cognizant of.



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1           Is -- I know what my perspective is  
2           and I have to keep, you know, that To  
3           Kill a Mockingbird thing where I have to  
4           keep in mind where the prosecutor's  
5           coming from, or where a judge is coming  
6           from. And I think some of the  
7           understanding of the limitations involved  
8           in those trainings -- if a judge knows,  
9           okay, I'm ordering you to seize the  
10          weapons, from our angle, what are the  
11          hurdles for the cop that's serving it if  
12          the guy says, I don't have any weapons.  
13          The victim put that on the form. What  
14          are the avenues for us to take that? And  
15          training people together in that topic --  
16          and maybe other topics -- would be  
17          helpful.

18                But you know, meaningful,  
19                substantive training, not, you know,  
20                frou-frou, kind of, kumbaya stuff where,  
21                you know, people aren't paying attention.  
22                But stuff where it could be -- I'm not  
23                saying scenario-based -- but something  
24                where you have people having to interact  
25                and kind of spitball in terms of what





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1 they'll do and how they'll handle things  
2 as things come up. But I think it's key  
3 that we interact.

4 JUDGE HANTZ MARCONI: Makes sense.  
5 Anyone have -- before we run out of  
6 time -- anyone have any thoughts on  
7 offenders using the judicial system to  
8 further harass and control victims?

9 MR. ENDRES: I know that that's  
10 something that I certainly think a lot  
11 about.

12 Unfortunately, when you get a no-  
13 contact order, there's a lot of people  
14 who immediately think, I need an  
15 exception to that no-contact order so  
16 that we can discuss the kids or the  
17 finances, or we can discuss this or we  
18 can discuss that.

19 And if you're the victim of domestic  
20 violence and you've gone to the court to  
21 get a protective order to keep this  
22 person away from you, and then there's an  
23 immediate exception to discuss the kids,  
24 I think that's very intimidating.  
25 Because it shows that this isn't really a



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1 no-contact order, that you -- the court  
2 can't keep us apart type thing.

3 And certainly a lot of those  
4 exceptions -- for example, one of the  
5 common ones is they're allowed to have  
6 contact to talk about the children. And  
7 certainly we've had cases where when  
8 someone says, you're a horrible mother,  
9 they might be talking about the children  
10 there, but that -- that's -- begins to  
11 cross a line in becoming abusive again.

12 The other thing that we see a lot --  
13 and we were talking earlier about the --  
14 essentially recording people -- is we  
15 periodically get motions -- Richards  
16 motions -- essentially not to bring  
17 evidence from the defense in on a  
18 criminal trial, not to say, I want to  
19 call this witness who has a Fifth  
20 Amendment issue, but we see Richards  
21 motions more to keep evidence out of our  
22 trials.

23 INV. BERNIER: Yes.

24 MR. ENDRES: Where defense is filing  
25 a motion saying, you can can't call the



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1 victim because the victim has a Fifth  
2 Amendment right.

3 INV. BERNIER: Yes.

4 MR. ENDRES: And what's difficult is  
5 that the courts tend to respond to these  
6 motions by immediately appointing counsel  
7 for the victim.

8 So you have this scenario where the  
9 defendant is saying to the victim, if you  
10 talk to the police, you're going to get  
11 charged with a felony for recording me.  
12 And the court almost gives credence to  
13 that threat by immediately appointing  
14 counsel for the victim without speaking  
15 to the victim first.

16 So we have a lot of, you know, sort  
17 of, intimidation that's built in within  
18 in the acceptable range of doing things  
19 as a defense attorney or as a litigant.  
20 And I'm not sure what you can do to  
21 prevent that, but I think it's certainly  
22 something to be cognizant of that all of  
23 these exceptions to protective orders,  
24 all of these, you know, Richards hearings  
25 where people are immediately getting



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1 appointed counsel, it's an extremely  
2 intimidating process to begin with. And  
3 being told, oh, you're going to go to  
4 jail now. And then next thing you know,  
5 you have an attorney appointed to  
6 represent you, you got to be terrified.

7 INV. BERNIER: That's one example --

8 MS. HORNICK: The tension -- the  
9 tension between the Constitutional  
10 rights -- right -- of the defendant and  
11 the victim' rights. And we -- just as  
12 you so clearly elaborated, Steve -- we  
13 see that so regularly becoming a constant  
14 tool to try to get out of accountability.

15 MS. KRUEGER: It's coming up more in  
16 civil cases now. The defense bar is  
17 really pushing the Richards issues, and  
18 it's just all about the intimidation  
19 factor.

20 INV. BERNIER: Um-hum.

21 MS. KRUEGER: And you know, I mean,  
22 I can't fault defense attorneys claiming  
23 a defense, right? But I don't know when  
24 you start -- if the judge is there seeing  
25 this -- it's just interesting. I don't



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1 know what the right answer is to that,  
2 but it certainly -- it just does seem  
3 obvious that that's what's going on.

4 JUDGE HANTZ MARCONI:

5 (Indiscernible) --

6 MR. ENDRES: Especially when --

7 JUDGE HANTZ MARCONI: Go ahead.

8 MR. ENDRES: I'm sorry. Especially  
9 when you're seeing motions that are  
10 grounded on the victim has a Fifth  
11 Amendment right because I read this in  
12 the police report, meaning the state's  
13 been fully aware of this information for  
14 maybe a whole year and we haven't brought  
15 any charges against the victim, and now  
16 defense counsel is saying, oh, but they  
17 can be charge with. And some of the  
18 charges they come up with in the Richards  
19 motions are, you know -- to use the term  
20 frivolous and fanciful certainly hits the  
21 nail on the head.

22 I agree with Patricia with -- under  
23 the wiretap statute, if you have your  
24 phone out and you say, I'm recording you,  
25 there is no crime there. But we'll have



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1 defense attorneys filing motions saying,  
2 no, not only is there a crime there,  
3 that's a felony. Which, to the extent  
4 there is a crime, it's certainly not a  
5 felony. But we're seeing that more and  
6 more.

7 JUDGE HANTZ MARCONI: Well, and I  
8 would guess even exceptions -- well,  
9 exceptions or suspension, if you will --  
10 of a restraining order to allow someone  
11 to go into the house can be seen by -- to  
12 allow the offender to go into the house  
13 to get stuff or whatever -- can be seen  
14 as an accommodation and pretty  
15 intimidating to the victim. That they're  
16 losing control of, again, their space.

17 INV. BERNIER: Couple things that --

18 MS. LAFRANCE: Can I --

19 INV. BERNIER: -- are my new  
20 favorites --

21 MS. LAFRANCE: Yeah, can I just --  
22 I'm sorry. Can I just step -- can I just  
23 comment on what Steve just said because I  
24 want to get to the Richards issue.  
25 There's differences. Because as a



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1 prosecutor I saw it, and now as someone  
2 who also, you know, helps people get  
3 restraining orders and defends against  
4 them.

5 I bring Richards issues because I'm  
6 an officer of the court. And if I feel  
7 that the other side can potentially  
8 incriminate themselves, I feel it is my  
9 duty to bring it to the court's  
10 attention. I don't do it as some kind of  
11 ploy to intimidate the witness. I did it  
12 last week -- or two weeks ago, because  
13 mutual restraining orders, the person --  
14 the other side -- was literally charged  
15 with a crime, not my client.

16 So I informed the court she had  
17 potential Richards issues because if she  
18 testified in the restraining order  
19 hearing, she could potentially  
20 incriminate herself. Again, as an  
21 officer of the court, I felt it was my  
22 duty to raise that issue. I did it as a  
23 prosecutor as well.

24 But the -- where it it's abused is  
25 that -- and as a prosecutor I got this --



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1 these Richards issues from defendants  
2 because they felt their client was right,  
3 and their client was saying, well, the  
4 victim did this, this, this, and this, so  
5 they have a Richards issues. I'm like,  
6 no, no, no. That's not a Richards issue.  
7 Just because your client is saying that  
8 the victim did this doesn't mean she has  
9 a Richards issues.

10 If there was something in the police  
11 report where the victim said, I came at  
12 him first or I did that, well, yes, they  
13 would have a Richards issues. But if  
14 the -- if -- what's in the police report,  
15 there are no Richards issues in that  
16 police report, you don't raise it.

17 So there's a difference with  
18 something that the victim is admitting to  
19 doing that potentially might raise Fifth  
20 Amendment concerns and what I used to  
21 call what a defense wish they would  
22 testify to, which they're not.

23 JUDGE HANTZ MARCONI: Right. But of  
24 course I'm --

25 MS. LAFRANCE: So I think it's -- we





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1 need to be clear with that.

2 JUDGE HANTZ MARCONI: For our --  
3 yeah. I get that little piece of this.  
4 For our purposes, though, we're looking  
5 at whether -- and again, this came from  
6 some comments that had come in through  
7 the public comment line -- whether there  
8 is, sort of, this effort, if you will, to  
9 have offenders sort of use the system  
10 beyond even a Richards issue, but in  
11 other ways. Filing other parenting  
12 petitions or other things to harass or  
13 control victims. And I'm just trying to  
14 get to is this a -- is there more than  
15 this one issue, and is it something that  
16 we should be making recommendations on.  
17 Or even this one. But not just this one.

18 INV. BERNIER: Ex partes seem to be  
19 the new topic. Are the new -- you know,  
20 the new way to go about things. If a DV  
21 petition is served -- and I've lost count  
22 of how many defendants will go and file  
23 that ex parte for sole custody claiming  
24 that the victim is crazy. And then you  
25 end up with a defense attorney involved,



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1 and then you have a victim fearing that  
2 they're going to lose their children, so  
3 they drop the restraining order. That's  
4 one of them.

5 The other course of tactic is  
6 utilizing -- because they can do civil  
7 standbys, because they can contact the  
8 police, is having well-being checks done  
9 on the kids every single day. Or  
10 deciding that they need something from  
11 the house every single day because the  
12 order kind of allows that to happen.  
13 Those are two biggies.

14 I -- with the ex parte, I've even  
15 charged -- I've charged witness tampering  
16 with it under certain circumstances. And  
17 sometimes you can get around that. But  
18 I've found that using other civil  
19 processes has absolutely become more of a  
20 thing.

21 JUDGE HANTZ MARCONI: Good to know.

22 All right. We're ten minutes past.  
23 I was going to make you all volunteer in  
24 real time today, but I'm not going to do  
25 that. But I am going to be looking for



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1 volunteers to assist with the synthesis  
2 and coordination, and sort of, shaking  
3 out a first draft of some  
4 recommendations. I would like a couple  
5 people per charge. Something that, you  
6 know, catches your interest to dig a  
7 little deeper and make some concrete  
8 recommendations.

9 So in collaboration with the staff  
10 types, our little writing committee,  
11 that's going to be working and digging  
12 down. So I will be looking for that by  
13 email. I'm going to be looking for a  
14 raised hand from everybody. And we will  
15 put together a working draft with working  
16 parts. We will be circulating it in  
17 probably bits and pieces.

18 We will be anticipating a few more  
19 meetings. I know you will miss my  
20 smiling face, so don't worry, we'll be  
21 back together. But we're going to take a  
22 little bit of time and try to synthesize  
23 and organize the work that we've to date.

24 Continue with your, again, comments  
25 and suggestions in writing. To bring



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1       them in, something you forgot about, or  
2       something that came up while we were  
3       chatting today. And make your own lists  
4       because I don't want to leave anything  
5       out of our final collaborative process.

6               Anything else today? All right.

7       Again, thank you. Till next time.

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## 1 C E R T I F I C A T I O N

2

3 I, Grace Markarian, certify that the  
4 foregoing transcript is a true and  
5 accurate record of the proceedings.

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9



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10 Grace Markarian (CDLT-258)

11 TTA-Certified Digital Legal Transcriber

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17 Date: March 3, 2022

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<b>A</b>				
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